C1/2009/2276

IN THE COURT OF APPEAL

An appeal against an order made in the

Administrative Court at Leeds on 8/9/2009

dismissing an application for permission to proceed with

an application for a judicial review

namely

R (on the application of Graham Nassau Gordon Senior-Milne (formerly Milne))
(claimant)
v

The Parliamentary and Health Service Ombudsman
(defendant)

GROUNDS OF APPEAL

AND SKELETON ARGUMENTS IN SUPPORT

G. Senior-Milne
39 Castle St
Norham
Northumberland
TD15 2LQ

Contents

Introduction

1. This document is available on the internet via:

   www.happywarrior.org/judge_s_p_grenfell/index.htm

2. In this document each ground of appeal is given following the arguments supporting that ground of appeal as a conclusion in the form 'It is therefore a [further] ground of appeal that…'. These are my paragraph numbers:

   GROUNDS OF APPEAL

   a. 22 – Discounting criticisms of Judge Kaye
   b. 29 – Failure to dismiss irrelevant arguments
   c. 36 – Making a false statement
   d. 49 – Failure to dismiss irrelevant arguments
   e. 55 – Failure to understand the nature of my complaint
   f. 58 – Failure to identify that the Ombudsman did not dismiss my complaint as being outside her jurisdiction
   g. 61 – Failure to identify what the proper ground of application should have been
   h. 66 – Failure to explain an important matter (how I sought to rely on s.49 Insurance Companies Act 1982)
   i. 68 – Failure to assess the meaning of a critical provision (s.49 Insurance Companies Act 1982)
   j. 81 – Failure to identify that prudential regulation also covers protection of policyholders' reasonable expectations (PRE)
   k. 89 – Failure to identify that my complaint related to the contents of the policyholder circular, not just the sending out of that circular (and that it also related to the supervision of the demutualisation as a whole)
   l. 93 – Failure to identify proper basis of comparison between Equitable Life and Scottish Widows
   m. 100 – Failure to identify that continuing breach was a proper basis of argument and to take into account arguments and authorities, including a relevant House of Lords case
   n. 103 –Failure to identify that concealment of a material matter by a defendant is sufficient grounds on its own to disapply the 3 month time limit
   o. 107 – Failure to give proper weight to evidence of concealment
   p. 111 – Failure to identify applicability of s.5 Parliamentary Commissioner Act 1967 and failure to take into account evidence of concealment

3. References to the bundle are references to the bundle prepared for the associated appeal against costs (2009/1746), which includes all documents other than the judgement of Judge Grenfell, the appellant's notice for the appeal against that judgement and this document.

4. I would particularly draw the reader's attention to paragraphs 59 and following where I show that the whole basis of my original application was incorrect, that both judges (Kaye and Grenfell) failed to identify this fact and that my application should be amended accordingly.

5. This appeal is against an order made on 8/9/2009 by Judge S P Grenfell sitting in the Administrative Court at Leeds dismissing an application for permission to proceed with an application for judicial

review, being a (telephone) hearing resulting from the renewal of an application rejected on the papers.

6. The application, which was made on 29/5/2009, was against the Parliamentary and Health Service Ombudsman ('the Ombudsman') in relation to two 'decisions':

    a. her refusal to consider a complaint of 21/10/2006 made to her by the appellant against the Financial Service Authority (FSA) on the grounds that the complaint was outside her jurisdiction;

    b. her refusal to respond in any substantive way, other than by acknowledgement slips, to a complaint of 16/2/2009 (reminders of 15/3/2009 and 13/4/2009, Letter Before Claim of 1/5/1009) made by the appellant that 4 separate members of staff in the Ombudsman's office, including a director, had lied to the appellant in claiming that his complaint of 21/10/2006 was outside her jurisdiction, which fact the appellant discovered in January 2009 by reading the Ombudsman's report of July 2008 on the Equitable Life crisis.

7. I do not intend to repeat material already covered in existing documentation (that is, the original application and related documents and the subsequent appeal against costs and related papers), but I do wish to re-iterate the following:

    a. My complaint to the Ombudsman of 21/10/2006 (see 6(a) above) was rejected on the grounds that it was outside her jurisdiction (but see paragraph 59 below); no other reason was given. In other words, the Ombudsman did not assess whether or not to carry out an investigation into my complaint because it was dismissed before it got to that stage;

    b. My application for a judicial review of that decision (see 6(a) above) was made solely on the grounds that my complaint to the Ombudsman was rejected on the grounds that it was outside her jurisdiction;

    c. The Court was not asked and has no power to consider the merits of my complaint to the Ombudsman; that is, whether my complaint justifies an investigation by the Ombudsman. Under s.5(5) Parliamentary Commissioner Act 1967 this is a matter for the Ombudsman to assess in accordance with her own discretion (but subject to the rules of natural justice) if and when the court orders her to make such an assessment on the grounds that my complaint was within her jurisdiction.

    d. <u>The Ombudsman herself argued in her Summary Grounds for Contesting the Claim (para 37 of that document) that under s.5(5) the Court has no authority to substitute its views for those of the Ombudsman. This must clearly apply regardless of who asks the court to substitute its own view, so that the court is not entitled to substitute its own view for that of the Ombudsman even if the Ombudsman asks the court to do so. This clearly includes the Ombudsman's view on the likelihood that she will decide to carry out an investigation into my complaint.</u>

    e. It follows that the only question that the Court needs to consider is whether my complaint was within the Ombudsman's jurisdiction and that if the Court does otherwise it will be taking into account irrelevant considerations and acting unlawfully in doing so.

f. While, as the Ombudsman argued, the Court has no power to order the Ombudsman to carry out an investigation, it does have the power to order the Ombudsman to assess whether or not she should carry out an investigation. This would be on the basis that the Ombudsman is legally bound to assess any complaint that is within her jurisdiction (in order to decide whether or not to carry out an investigation), since the power to exercise discretion as to whether or not to carry out an investigation into a complaint necessarily implies a duty to assess that complaint in the first place.

g. Let me re-iterate that the function of the court in this application is to assess whether I have a reasonable chance of establishing that my complaint to the Ombudsman was within her jurisdiction; it is not the function of the court (and the court has no power) to assess whether my complaint to the Ombudsman provided prima facie grounds for her to carry out an investigation (that is the Ombudsman's function and the court has no power to substitute its own judgement in the matter); it is not the function of the court (and the court has no power) to assess whether the FSA properly supervised the Scottish Widows demutualisation; it is not the function of the court (and the court has no power) to assess whether the directors of Scottish Widows and Lloyds TSB committed criminal offences; it is not even the function of the court to determine whether my complaint actually was within the Ombudsman's jurisdiction, merely whether I have a reasonable chance of establishing that it was.

IMPORTANT NOTE

8. This section is a postscript.

9. My complaint to the Ombudsman was rejected on the basis that the policyholder circular explaining the proposed terms of the demutualisation (sale of Scottish Widows to Lloyds TSB Group) sent by Scottish Widows to its policyholders in November 1999 was a communication between Scottish Widows and its customers and so fell within the scope of the FSA's conduct of business regulation functions, as opposed to its prudential regulation functions, and that these conduct of business regulation functions were not carried out by the FSA on behalf of the Treasury at the time and were therefore outwith the Ombudsman's jurisdiction.

10. It is critical to remember, however, that my complaint concerned 'the regulatory supervision [by] the FSA of the Scottish Widows demutualisation in 2000', as per my original E-Mail to the Ombudsman of 21/10/2006 (bundle page 00082), so it included the FSA's supervision of Scottish Widows GAR liabilities generally during that process and was not just restricted to the FSA's supervision of the sending out of the policyholder circular and the FSA's failure to ensure that Scottish Widows' GAR liabilities were properly disclosed in that document.

11. Much has been made, by both the defendant and the two judges involved in this case to date, of the differences between the Equitable Life crisis and the Scottish Widows demutualisation, primarily on the grounds that the Ombudsman's investigation into the Equitable Life crisis arose from the FSA's failure to properly supervise the solvency of that company and that Scottish Widows, in contrast to Equitable Life, was able to meet its liabilities (though I would argue this point – both companies met their GAR liabilities in the same way, by making the ordinary policyholders pay the GAR policyholders and the fact is that NEITHER company had the money to

meet their GAR liabilities; it was the policyholders who did that in both cases).

12. It has been accepted, both by the defence and both judges, that the FSA's supervision of the GAR liabilities of Equitable Life was a solvency issue, and it was because solvency issues fell within the FSA's prudential regulation functions that they fell within the Ombudsman's jurisdiction. And it was this that allowed the Ombudsman to investigate the matter and to issue her subsequent report.

13. The logic of what I am trying to say is best illustrated from this point forward by a series of questions and answer, as follows:

Q: So the supervision of the GAR liabilities of Equitable Life was a solvency issue?
A: Yes
Q: And the Ombudsman accepted that?
A: Yes.
Q: So the supervision of the GAR liabilities of other life companies was also a solvency issue?
A: Yes.
Q: And this was the case whether they were solvent or insolvent? In other words, in supervising the solvency of a solvent company the FSA is still concerned with solvency?
A: Yes.
Q: So supervising the GAR liabilities of Scottish Widows was also a solvency issue, whether the company was solvent or not?
A: Yes.
Q: And this was the case during the demutualisation process?
A: Yes.
Q: So the supervision of Scottish Widows' GAR liabilities did not stop being a solvency issue just because the company was going through a demutualisation process?
A: No.
Q: So if the supervision of Scottish Widows' GAR liabilities during the demutualisation was a solvency issue, a complaint about the FSA's supervision of Scottish Widows' GAR liabilities during the demutualisation was a complaint about the FSA's supervision of Scottish Widows' solvency?
A: Yes.
Q: And on that basis it fell within the Ombudsman's jurisdiction?
A: Yes.
Q: So even if the supervision of the sending out of the policyholder circular fell within the FSA's conduct of business regulation functions, the supervision of Scottish Widows GAR liabilities generally during the demutualisation fell within the FSA's prudential regulation functions, as a solvency issue?
A: Yes.
Q: So the question of whether the supervision of the sending out of the policyholder circular did or did not fall within the FSA's conduct of business regulation functions is actually irrelevant, because you were complaining about the FSA's supervision of Scottish Widows GAR liabilities generally during the demutualisation?
A: Yes.
Q: And whether or not Scottish Widows had sent out a policyholder circular, the FSA were still under an obligation to ensure that the existence of Scottish Widows' £1.5 billion was properly disclosed to policyholders?

A: Yes.
Q: It is the broader failure of the FSA themselves to communicate with the policyholders, one way or another, directly or indirectly, including via the circular, that matters?
A: Yes.
Q: Since your complaint was against the FSA and not Scottish Widows?
A: Yes.
Q: And the FSA could have written to policyholders directly, issued a press release or put a notice in the newspapers, amongst other things?
A: Yes.
Q: Or, acting as prudential regulator supervising the solvency of the company during a demutualisation, required Scottish Widows to do any of these things?
A: Yes.
Q: In fact, your original complaint, which forms the basis of your application for judicial review, makes no mention of the policyholder circular?
A: It doesn't.
Q: But both judges dismissed your application on the basis that the sending out of the policyholder circular fell within the FSA's conduct of business regulation functions?
A: Yes.
Q: They took no account of the fact that your complaint concerned the FSA's supervision of the Scottish Widows' demutualisation generally, including their supervision, as prudential regulator, of that company's GAR liabilities during that process?
A: No.

14. I have consistently tried to emphasize that, regardless of the arguments about the policyholder circular, my original complaint to the Ombudsman was about the FSA's supervision of the Scottish Widows' demutualisation generally, but including and with particular emphasis on the supervision of Scottish Widows' GAR liabilities during that process and the FSA's failure (not Scottish Widows') to ensure that the existence of those liabilities was properly disclosed to policyholders.

15. In spite of this the Ombudsman has persisted (perhaps not surprisingly) in concentrating on the policyholder circular and, ignoring time limit issues, both judges dismissed my application on the basis that the sending out of that circular fell within the scope of the FSA's conduct of business regulation functions, which did not fall within the Ombudsman's jurisdiction, as opposed to its prudential regulation functions, which did.

16. I have argued, because I believe it to be both true and self-evident, that under s.49 Insurance Companies Act 1982 the supervising of the disclosure of the terms of the demutualisation, as explained in the policyholder circular, fell within the scope of the FSA's prudential regulation functions, and those arguments still stand. But it is evident that this issue is COMPLETELY IRRELEVANT for the reasons explained above.

17. Thus, the key reason for dismissing my application argued by the defendant and accepted by both judges, was COMPLETE NONSENSE.

The judgement of Judge S P Grenfell

18. I intend to address various matters in the judgement in the order in which they appear in the

judgement as follows.

Paragraphs 1 to 10 of the judgement (introduction and background)

19. Paragraphs 1 to 10 of the judgement form the introduction and background.

Paragraph 5 of the judgement (criticisms of Judge Kaye)

20. In relation to my renewal application Judge Grenfell states that *'unfortunately, Mr Senior-Milne misunderstood the procedure and has spent much time and effort criticising Judge Kaye's reasoning, when, as I explained to him, the oral hearing was his opportunity to present and enlarge on his arguments afresh.'* I do not think I misunderstood the procedure at all. When someone makes a wrong decision you seek to change that decision by explaining why it was wrong. That is what I did and what I am entitled to do, unless the courts operate on the basis that where a judge makes a wrong decision the claimant is barred from explaining why that decision is wrong. Judge Grenfell appears to be confusing a renewal hearing with a re-trial.

21. The procedure is laid down in CPR 54 which simply states (54.12) that a claimant *'may request the decision to be reconsidered at a hearing'*. The word 'reconsidered' does not preclude a claimant from submitting additional arguments explaining why the decision on the papers was wrong, nor does it preclude the Court from considering such arguments. If there are any other procedures that are not publicly available then it is hardly surprising that I do not know about them and it would be a breach of my right to a fair trial to make me subject to procedures or requirements without informing me about them.

22. It is therefore a ground of appeal that Judge Grenfell discounted my 'criticisms' of Judge Kaye's reasoning when he should not have done so and misdirected himself accordingly.

Paragraphs 10 to 45 of the judgement (which concern the first ground of my application for a judicial review)

23. Paragraphs 10 to 45 of the judgement concern the first ground of my application for a judicial review; that is, the Ombudsman's decision that my complaint to her about the FSA was outside her jurisdiction.

Paragraph 10 of the judgement (allegations against Judge Kaye)

24. Judge Grenfell refers to me making '*the remarkable allegation that Judge Kaye exhibited bias against him by relying on such material'*. My allegation was not remarkable at all in the context that Judge Kaye took into account irrelevant arguments (relating to the merits of my complaint to the Ombudsman) and acted unlawfully in doing so, and clearly knew that he was acting unlawfully in doing so. What is remarkable is the fact that Judge Kaye persisted in taking these irrelevant arguments into account when it was quite clear that he should not do so and in spite of the fact that I pointed this out to him in my submissions. An allegation is remarkable only if it is clearly not justified by the facts. As I make clear both here and in my previous submissions, arguments put forward by the defendant relating to the merits of my complaint to the Ombudsman are

completely irrelevant, and nothing that either Judge Kaye or Judge Grenfell can say will make them otherwise.

25. **It is an elementary fact, known to law students everywhere, that a judicial review is not a review of a decision but a review of the manner in which a decision was made; that is, a review of the process. Whether a decision will actually be changed as a result of having to re-make it is therefore not a question which a court can or should consider and any arguments put to the court to that effect are clearly irrelevant. In fact, the court has no legal power to consider this question.**

26. As Brightman LJ stated in Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 at 1174: *'Where Parliament has entrusted to an administrative authority the duty of making a decision which affects the rights of an individual, the court's supervisory function on a judicial review of that decision is limited. The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision nor is it desirable that evidence should be called before the court of the implications of such policy.* ***It follows that the court ought not to attempt to weigh the merits of the particular decision but should confine its function to a consideration of the manner in which the decision was reached.'*** [my emphasis] So the point is that if the Ombudsman had accepted that my complaint was within her jurisdiction but had made a decision not to carry out an investigation into it, the court would have had no power to interfere with that decision on the basis of a consideration of the merits of my complaint; the court could only have interfered on procedural grounds. **If follows that if the court has no power to consider the merits of my complaint when the Ombudsman has made a decision, the court certainly has no power to consider the merits of my complaint when she hasn't.**

27. Let me give you an example from a House of Lords case that demonstrates my point quite clearly. One of the arguments put forward by the Ombudsman was that I was the only person to complain to her about the Scottish Widows demutualisation. She sought to have my application dismissed (at least in part) on this basis. In Secretary of State for the Home Department ex parte Venables and Thompson, R v. [1997] UKHL 25; [1998] AC 407; [1997] 3 All ER 97; [1997] 3 WLR 23; [1997] 2 FLR 471; [1997] Fam Law 786 (12th June, 1997), it was held that the Home Secretary, acting in what was effectively a judicial capacity, was wrong to take into account numerous public protestations when making a sentencing decision. It is clear that if it is wrong to take into account the fact that there are many public protestations on an issue, it is equally wrong to take into account the fact that there is only one public protestation on an issue. Relevant statements [my underlining] are:

    LORD GOFF OF CHIEVELEY

    'should he take into account public clamour directed towards the decision in the particular case which he has under consideration, he will be having regard to an irrelevant consideration which will render the exercise of his discretion unlawful.'

    LORD STEYN

    'the Home Secretary misdirected himself by giving weight to public protestations about the level at which the tariff in the cases of Venables and Thompson should be fixed. In doing so the Home Secretary took into account in aggravation of the appropriate level of punishment legally irrelevant

considerations. This was a material defect in the reasoning of the Home Secretary. It rendered his decisions unlawful.'

The comparison between the position of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the position of a sentencing judge is correct. In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function: see Lord Diplock's explanation of the importance of the separation of powers between the Executive and the judiciary in Hinds v. The Queen [1977] A.C. 195, 212; and Dupont Steels Ltd. v. Sirs [1980] 1 W.L.R. 142, 157. Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy of fixing a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power. Parliament must be assumed to have acted have entrusted the power to the Home Secretary on the supposition that, like a sentencing judge, the Home Secretary would not act contrary to fundamental principles governing the administrative of justice. Plainly a sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abdication of the rule of law for a judge to take into account such matters. The same reasoning must apply to the Home Secretary when he is exercising a sentencing function. He ought to concentrate on the facts of the case and balance considerations of public interest against the dictates of justice. Like a judge the Home Secretary ought not to be guided by a disposition to consult how popular a particular decision might be. He ought to ignore the high voltage atmosphere of a newspaper campaign. The power given to him requires, above all, a detached approach. I would therefore hold that public protests about the level of a tariff to be fixed in a particular case are legally irrelevant and may not be taken into account by the Home Secretary in fixing the tariff. I conclude that the Home Secretary misdirected himself in giving weight to irrelevant considerations. It influenced his decisions. And it did so to the detriment of Venables and Thompson.

For this further reason I conclude that his decisions were unlawful.'

LORD HOPE OF CRAIGHEAD

'But the imposition of a tariff, which is intended to fix the minimum period to be spent in custody is, in itself, the imposition of a form of punishment. This has, as Lord Mustill observed in Regina v. Secretary of State for the Home Department, Ex parte Doody, at p. 557A-B, the characteristics of an orthodox judicial exercise, which is directed to the circumstances of the offence and those of the offender and to what, having regard to the requirements of retribution and deterrence, is the appropriate minimum period to be spent in custody. The judge, when advising the Secretary of State about the tariff, must and does confine his attention to these matters. He does not take account of public petitions or public opinion as expressed through the media. Expressions of opinion from these sources, however sincere and well presented, are rarely based on a full appreciation of the facts of the case. More importantly, they cannot be tested by cross-examination or by any other form of inquiry in which the prisoner for his interest can participate. Natural justice requires that they be dismissed as irrelevant to the judicial exercise, as it would be unfair for the judge to allow himself to be influenced by them.'

28. The same logic could be applied to all of the Ombudsman's arguments concerning the merits of my complaint to her – and yet neither Judge Kaye nor Judge Grenfell have ruled that these arguments are irrelevant (indeed, they have effectively ruled that they are relevant – see also paragraph 45 of

Judge Grenfell's judgement where he says that these arguments would have been relevant had he not rejected my application on other grounds). This failure to identify that virtually all the arguments put forward by the defendant were irrelevant is so fundamental that it undermines the validity of the proceedings entirely.

29. It is therefore a further ground of appeal that Judge Grenfell failed to identify that virtually all the arguments put forward by the defendant were irrelevant and that this is so fundamental that it undermines the validity of the proceedings entirely.

Paragraph 11 of the judgement (the so-called 'killer point')

30. In paragraph 11 of his judgement Judge Grenfell states *'Mr Senior-Milne's argument in essence is that the only real issue on his first application for judicial review is whether or not the Parliamentary Ombudsman erred in making her decision that she had no jurisdiction to investigate Mr Senior-Milne's complaint. He submits that he has a complete answer, a 'killer' point, which no one but he appears yet to have grasped.'*

31. In the first place, Judge Grenfell is putting words into my mouth. I have an authenticated verbatim record of the hearing and I never used the words 'killer point' or any similar words or indeed any words that could reasonably give rise to such an impression. Like any other party in any case I put my arguments forward and, like any other party, I regarded some arguments as stronger than others but I never submitted that I had either a 'complete answer' or a 'killer point'. Judge Grenfell's statement that *'He submits that he has a complete answer, a 'killer' point, which no one but he appears yet to have grasped'* is therefore false. I made no such submission.

32. Although Judge Grenfell does not identify this 'killer point' I assume that he is alluding to the FACT that the Scottish Widows policyholder circular of November 1999, which was the key document explaining the terms of the proposed sale of Scottish Widows to Lloyds TSB Group plc, and is the document in which the existence of the £1.5 billion GAR liability should have been made clear, was prepared and circulated in accordance with the requirements of s.49 Insurance Companies Act 1982, that s.49 is in Part 2of that Act and that the Ombudsman herself acknowledges (paragraph 39 of her Summary Grounds) that Part 2 of the Act covers prudential regulation. It therefore follows, as night follows day, that since the prudential regulation functions of the FSA are within the Ombudsman's jurisdiction, that complaints relating to a policyholder circular prepared and sent out under s.49 are within the Ombudsman's jurisdiction, <u>but note that my complaint was not restricted to the circular but concerned the FSA's supervision of the whole demutualisation process (including the circular), which certainly fell within the prudential regulation functions of the FSA</u>. I never said or claimed that this was a 'killer point' but it is a simple statement of FACT that, on this basis, my complaint to the Ombudsman was within her jurisdiction. Since Judge Grenfell raises this issue later in his judgement, I will deal with it later accordingly.

33. In the second place, Judge Grenfell asserts that I claimed that I had a *'killer point which no-one but he appears to have grasped'* but it was, in fact, a critical element of my argument that the Ombudsman's staff were fully aware that my complaint was within the Ombudsman's jurisdiction on the basis explained above (i.e. that s.49 is within Part 2 of the Act and that Part 2 deals with prudential regulation – and I know of no other statute where transfers of long-term business and related policyholder circulars are referred to).

34. So why would Judge Grenfell put words into my mouth and say that I claimed that no-one knew of this 'killer point' when it was, in fact, a central part of my argument that the exact opposite was the case? The only logical explanation is that he was trying to ridicule me – *'He thinks he has a killer point that no-one else has noticed!'* – and when a judge resorts to trying to undermine a party's case by ridicule he has ceased to act with proper impartiality; he has become impartial. And, I am afraid to say (but it must be said – I absolutely insist on that), that an impartial judge is a corrupt judge. The whole judicial edifice collapses in such circumstances; all rules, all laws, all cases, all precedent, all ceremony, all procedure, all the tradition and history of the system of justice in this country are brought to nothing; they are rendered worthless and meaningless by one man. Congratulations.

35. Let us get this clear. Judge Grenfell made a statement which is false. Did he do this by mistake? No, of course not. So he did it deliberately? Yes. So he made a deliberate false statement? Yes. Which means that he lied? Yes. So we have a judge who lied? Yes.

36. It is therefore a further ground of appeal that Judge Grenfell lied when he said *'He submits that he has a complete answer, a 'killer' point, which no one but he appears yet to have grasped'*.

Paragraph 14 of the judgement (relevant and irrelevant arguments)

37. In paragraph 11 of his judgement Judge Grenfell states *'I made it clear to Mr Senior-Milne at the hearing that this line of argument indicated a fundamental lack of understanding of the principles by which civil courts function. The court has to treat the parties before it on an equal footing. That means in the context of this case taking account of all arguments on both sides that are relevant to matters in dispute. The Parliamentary Ombudsman was entitled to raise the argument in response to an application for judicial review of her decision that, even, if she had jurisdiction, there was no reasonable prospect of the complaint succeeding.'*

38. In the first place Judge Grenfell says that I do not understand that the court must take account of all arguments that are **relevant** to the dispute. This is nonsense. I am a fully aware of this. My whole point was that most of the arguments put forward by the Ombudsman related to the merits of my case and that these arguments were **irrelevant** since, as I have explained above, the only matter that the court needs to consider (indeed, has the power to consider) is whether my complaint was within the Ombudsman's jurisdiction.

39. The illogical nature of Judge Grenfell's words can be best illustrated by a dialogue:

    Me: *'I submit that the defendant's arguments are irrelevant.'*

    Judge Grenfell: *'You don't understand, Mr Senior-Milne, the defendant is entitled to put forward any relevant arguments.'*

    Me: *'I am aware that the defendant can put forward relevant arguments, but my point is that they are irrelevant.'*

    Judge Grenfell: *'You don't understand, Mr Senior-Milne, the defendant is entitled to put forward any relevant arguments.'*

Me: *'I am aware that the defendant…'' etc. etc.*

[repeat this duet *ad infinitum*]

40. The question is therefore *'What is relevant?'*

41. Judge Grenfell states that *'The Parliamentary Ombudsman was entitled to raise the argument in response to an application for judicial review of her decision, that even if she had jurisdiction, there was no reasonable prospect of the complaint succeeding.'* The problem is that, as pointed out above, this is a decision for the Ombudsman herself to make; the court has no power to substitute its own decision for that of the Ombudsman, even if the Ombudsman asks the court to do so.

42. I would like to illustrate this point by reference to an example (R v. Brent LBC ex p Gunning (1985) 84 LGR 168) where a public authority decided to close a school and did so without carrying out a proper public consultation exercise. An application was made for a judicial review on this basis. The application was granted and the court ordered the authority to carry out a public consultation exercise. Now, according to Judge Grenfell's logic, the authority would have been entitled to argue in court that there was no point in ordering them to carry out a public consultation exercise because even if such an exercise were to be carried out, the authority would not change its decision; it would still close the school. According to Judge Grenfell this argument would have succeeded because there is patently no reasonable chance of the decision being changed (since the authority has said it will not change its decision). But this is demonstrable nonsense, because the Court never went beyond the question of procedural impropriety; it simply said *'You haven't followed the right procedure. Go away and do so.'* The court did not and had no power to look beyond the question of procedural impropriety and anticipate what the authority's decision would be – even if the authority had told the court what its decision would be, as I have already explained. See also R v. S of S for Social Services ex p AMA [1986] 1 All ER 164.

43. <u>As I have already stated, it is an elementary fact, known to law students everywhere, that a judicial review is not a review of a decision but a review of the manner in which a decision was made; that is, a review of the process. Whether a decision will actually be changed as a result of having to re-make it is therefore not a question which a court can or should consider and any arguments put to the court to that effect are clearly irrelevant. In fact, the court has no legal power to consider this question. Is it possible that Judge Grenfell is not aware of this fact?</u>

44. The next question is what happens where a defendant does raise an irrelevant argument to the effect that he will not change his decision (or that he will make a decision in a certain way, as happened in this case)?

45. On the one hand it could be argued that the court is perfectly capable of identifying and dismissing irrelevant arguments, so it doesn't matter whether such arguments are put forward.

46. On the other hand it could be argued that even where a court says it has not been swayed by an irrelevant argument, it is important that justice must not only be done but must be seen to be done (particularly where there is a litigant in person), and, on this basis, it is not enough for the court to say that it has not been swayed by an irrelevant argument, there must be NO POSSIBILITY* that it could have been swayed by an irrelevant argument. The only way to achieve this is for the irrelevant argument to be struck out and for a re-hearing (not a renewal hearing) to be held in front

of another judge.

*see Lord Chief Justice Hewart's use of the word 'nothing' in the next paragraph.

47. The answer to which of the above arguments is right can be found by asking the simple question: *'Which of the two is the safe route? Which one GUARANTEES that an irrelevant consideration will not sway the court?'* In other words *'Is it safe to ASSUME that a court will not be swayed by irrelevant arguments or to accept a judge's word on the point?'* The answer is obvious. There is not necessarily any implication that a judge is not telling the truth when he says that he has not been swayed, but, in the interests of justice, it must be seen that there is no possibility that he could have been swayed. This is elementary reasoning. In R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER 233) Lord Chief Justice Hewart said *'Nothing* [my emphasis] *is to be done which creates even a suspicion that there has been an improper interference with the course of justice.'* and it is '*of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'* In a situation where a party puts forward irrelevant arguments and the judge fails to rule that the arguments are irrelevant, does this not create a 'suspicion' that there has been an improper interference with the course of justice; that the irrelevant arguments have swayed the court and that the court has acted unlawfully in allowing them to do so?

48. Judge Grenfell is therefore quite correct to say that a party is entitled to raise relevant arguments, but where a defendant raises irrelevant arguments (and particularly where he does so with a clear intention of swaying the court), not only is the court not entitled to take such arguments into account but the only way to guarantee that the court does not take them into account is for those arguments to be struck out and for a re-hearing to be held. In circumstances where two High Court judges in succession have taken irrelevant arguments into account, it becomes clear that judges simply cannot be trusted; they must be prevented from seeing such material at all. I rest my case.

49. It is therefore a further ground of appeal that Judge Grenfell has misdirected himself in this matter.

Paragraph 20 of the judgement (basis of original complaint to Ombudsman)

50. Judge Grenfell states *'The essential basis of the complaint was that a contingent liability of £1.5bn existed at the time of the Scottish Widows' demutualisation; that this contingent liability later crystallised; that this contingent liability was not disclosed to Scottish Widows policyholders at the time of the demutualisation; that the directors of Scottish Widows must have knowingly failed to disclose the existence of this contingent liability; that, since the FSA were closely monitoring the GAR liabilities of all the life companies, the FSA must have known about the GAR liability and did nothing about it.'*

51. This is not true. The essential basis of my complaint was not that the circular did not disclose the existence of the GAR liability but that it did not properly disclose the existence of the GAR liability. The difference is critical since my complaint concerned the adequacy of disclosure, not failure to disclose.

52. As I have stated elsewhere, the policyholder circular referred to *'any additional cost of meeting*

guaranteed benefits'. This general statement does not amount to proper disclosure in a situation where it is known that there is a specific risk of a £1.5 billion contingent GAR liability crystallising. So, the question is whether the specific contingent GAR liability was properly disclosed.

53. In addition, as I have also stated elsewhere, saying that if the contingent liabilities allocated to the With Profits Fund materialize they could *'deplete the entire amount of the Additional Account'* is meaningless in a situation where the existence, nature and extent of the contingent liabilities allocated to the With Profits Fund have not been disclosed in the first place. If you do not disclose the existence of a known, specific liability, saying that general, unspecified liabilities (*'**any** [my emphasis] additional cost of meeting guaranteed benefits'* – p.23 of the circular) could have such and such a consequence is rather like saying *'A meteor may hit this town tomorrow'.* The listener will entirely discount such a statement because you have not told them that there is actually a meteor heading in the direction of the town; they will have no understanding of the risk. However, if you say *'There is a meteor heading in our direction and it may hit this town tomorrow'* the listener obtains a proper understanding of the risk. So to obtain a full understanding, the listener (or reader in this case) must be made aware of the specific risk. Again, this does not concern non-disclosure, it is concerned with the adequacy of disclosure. It will be obvious to anyone that the Directors of Scottish Widows and Lloyds TSB Group were not so stupid as to not disclose the matter at all; in fact, they were extremely careful to disclose the matter but to do it in such a way (1) that the policyholders did not understand that there was a £1.5 billion GAR liability and (2) that the Directors could still argue that technically they had disclosed the liability. The arguments put forward by the Ombudsman and the Judge Grenfell are a measure of how successful they have been in this deception.

54. Judge Grenfell has therefore made a critical error of fact about the fundamental basis of my complaint. It is clear, on this basis, that his command of the facts of the case is hopelessly inadequate.

55. It is therefore a further ground of appeal that Judge Grenfell did not have a sufficient command of the facts to be able to make a sound judgement.

Paragraph 25 of the judgement (the Ombudsman's reasons for her decision)

56. Judge Grenfell states that *'The Parliamentary Ombudsman by letter of the 26th October 2006 gave specific reasons for not investigating the complaint which can be summarised as follows. The complaint related to a matter between Scottish Widows and its customers, namely the sending out of the 1999 Circular, an action of the FSA under its conduct of business responsibilities.'* In fact, if you read the letter it does not say that my complaint related to the conduct of business regulation functions of the FSA; it actually just says that, in general, the Ombudsman cannot investigate complaints which relate to such functions. Like all good bureaucrats they seemed to answer the question but actually didn't. Nowhere in the letter is it stated that my complaint was not within the Ombudsman's jurisdiction.

57. Judge Grenfell has therefore made a fundamental error of fact about the most important document in the whole case, and on the most important point. He evidently did not read or did not properly understand the most important document in the case; the 'decision letter'. It is clear, on

this basis, that his command of the facts of the case is hopelessly inadequate.

58. It is therefore a further ground of appeal that Judge Grenfell did not have a sufficient command of the facts to be able to make a sound judgement.

59. Further, had Judge Grenfell actually read the various relevant letters quoted in my application he would have found that at no time did the Ombudsman actually state that my complaint was outside her jurisdiction; not in the letters of 26/10/06 (p. 41 and p. 78 of bundle), 6/2/08 (p. 44 and p. 85 of bundle), 14/2/08 (p. 46 and p. 87 of bundle) or 31/7/08 (p. 48 and p. 91 of bundle). It is true that Carol Aucterlonie's letter to me of 31/7/08 did say *'following our decision to decline your complaint as outwith the Ombudsman's jurisdiction'*, but this letter does not amount to a decision to that effect, it is a statement to the effect that they had made such a decision in the past. But, as the three previous letters referred to above make clear, NO SUCH DECISION HAD IN FACT BEEN MADE.

60. **Thus Judge Grenfell (and Judge Kaye), had he read the papers, should have come to the conclusion that the real basis of my complaint was not that the Ombudsman had decided that my complaint was outside her jurisdiction but that she had failed to make a decision on the question of jurisdiction at all. He should then have amended the grounds of my application accordingly or allowed/instructed me to do so.**

61. It is therefore a further ground of appeal that Judge Grenfell failed to indentify that the proper basis of my application should have been that the Ombudsman had failed to decide on the question of jurisdiction at all and not that she had ruled that my complaint was outside her jurisdiction.

62. Note that I applied on the basis that the Ombudsman had said that my complaint was outside her jurisdiction but that two High Court judges have failed to notice that this is not correct. The Ombudsman never said any such thing. I did not notice this until 20/10/2009 but I am not a judge or a lawyer; Judges Kaye and Grenfell are – and they should have picked up on this point accordingly.

Paragraph 29 of the judgement (s.49 Insurance Companies Act 1982)

63. Judge Grenfell states *'Mr Senior-Milne relies on the fact that the Court of Session was satisfied in respect of the above in order for it to have granted the application.´* What does this mean? Judge Grenfell says *'There is a law.'* (i.e. s.49). He says *'Mr. Milne seeks to rely on that law.'* Yes? And? Judge Grenfell does not explain <u>how</u> I sought to rely on that law, so his statement is left hanging in the air; it is meaningless without further explanation. So let me explain.

64. What I did was to point out that the petition to the Court of Session for approval of the demutualisation scheme was made under s.49 Insurance Companies Act 1982 (as stated on the petition itself) and that this demonstrates quite clearly that the sale of Scottish Widows to Lloyds TSB was therefore a transfer of long term business under Part 2 of the Insurance Companies Act 1982 (since s.49 is in Part 2). Since this is the case, it clearly follows that the policyholder circular explaining the terms of the then proposed transfer was prepared and sent out under s.49 Insurance Companies Act 1982. The question is *'If the transfer of long term business was carried out under*

s.49, and was a prudential regulation matter as a result, how can the most important document in that process (the one that explains the terms of the transfer to those who have to approve it) not fall within s.49, particularly when s.49 actually includes a requirement to send out that document?' Now, perhaps, we can see why, it appears, Judge Grenfell refers to my arguments on s.49 as a 'killer point' even though I did not do so. One can see his logic.

65. My argument continued to the effect that since Part 2 of the Act concerned prudential regulation, as agreed by the Ombudsman herself (see above), my complaint to the Ombudsman concerned prudential regulation.

66. It is therefore a further ground of appeal that Judge Grenfell did not clarify this matter.

67. Having quoted s.49 Insurance Companies Act 1982 in paragraph 28, which is presumably the 'killer point' that he mentions in paragraph 11 of his judgement, Judge Grenfell quite remarkably fails to assess what the words of that section actually mean. He does not ask the question *'Do the words of s.49 mean that the preparation and sending out of a policyholder circular under that section falls within the prudential regulation function of the FSA, as Mr. Senior-Milne claims?'* He just sidesteps the question by moving onto to general issues in his paragraphs 30, 31 and 32 as described below. The question I ask is how, having identified that this was my 'killer point' (according to him), Judge Grenfell could then fail to assess whether I am right or wrong in my interpretation of s.49? How is this possible? Every day of the week lawyers and judges look at statute law and ask the question *'What does this law mean? How do we interpret the words? What is their effect?'* so on what possible grounds can Judge Grenfell not ask these simple and every day questions here? Is it possible that Judge Grenfell realised that my argument concerning s.49 is actually a 'killer point'? (but remember that this is his phrase, not mine), in the sense that s.49 makes it quite obvious that complaints to the Ombudsman concerning a policyholder circular prepared and sent out under s.49 do fall within the Ombudsman's jurisdiction as relating to the FSA's prudential regulation functions? Is this possibly why the Ombudsman put forward reams and reams of irrelevant arguments concerning the merits of my complaint – to draw attention away from this simple, obvious and undeniable fact? Is this why Mr. Child made an 'unusual appearance' – because he realised that there was a considerable risk that the Ombudsman would be caught lying to a member of the public on the basis of the plain and simple meaning of the words of s.49? It does all fit together rather well, doesn't it? I can understand Mr. Child's behaviour because he regards it as a fair tactic to try and bamboozle the court; I cannot understand Judge Grenfell's in being knowingly bamboozled (as it were).

68. It is therefore a further ground of appeal that Judge Grenfell failed to assess what the words of s.49 actually mean. What is their meaning and effect? He therefore failed to assess my most important argument. In effect, he just ignored it. Let us be clear on this point. He said that I had a 'killer point', he quotes the section on which that 'killer point' was based – but then he fails to ask what the words of that section actually mean and what their effect is. It an oversight so remarkable that one questions whether it can possibly have been accidental, which of course it wasn't. Judge Grenfell did not address the meaning of s.49 because its meaning is plain and obvious. It could not be plainer or more obvious.

69. It is rather like an accused saying *'I cannot have murdered the victim because I was 600 miles away at the time.'* The judge then says in his judgement *'The accused believes he has a 'killer point',*

which is that he was 600 miles away at the time of the murder.' [Silence] Yes? And? Is he right or wrong?

Paragraphs 30 to 32 of the judgement (prudential regulation – solvency and protection of policyholders reasonable expectations (PRE))

70. In paragraph 30 Judge Grenfell says: *'What then is business regulation as opposed to prudential regulation? Did the terms of the Insurance Act 1982 definitively indicate that the 1999 Circular came within prudential regulation?'*

71. In paragraph 31 Judge Grenfell continues: *'Business regulation plainly included regulation of the acquisition, disposal of insurance products, but that does not mean that it was exclusively concerned with that side of business. It is more helpful to consider what constituted prudential regulation. The important aspect of prudential regulation is to supervise the ability of an insurance company to meet its liabilities. The FSA's prudential regulation plainly lay in ensuring that Scottish Widows could meet its liabilities including its GAR liabilities. Mr Senior-Milne's complaint, however, was that the 1999 Circular potentially misled policy holders into believing that the 'Additional Fund' of £1.5bn might be distributed to them in whole or in part; therefore, they were misled into agreeing to the demutualisation and sale.'*

72. In paragraph 32 Judge Grenfell continues: *'In my view, the Parliamentary Ombudsman's view that the FSA was concerned **ONLY** with Scottish Widows' ability to meet its liabilities in full as prudential regulator is entirely logical.* [my emphasis] *Similarly the Parliamentary Ombudsman's view that the FSA had no concern as prudential regulator with regulating the sending out of the Circular is entirely logical. The Parliamentary Ombudsman's view that the sending out of the Circular was a matter of business regulation is entirely logical and correct.'*

73. Judge Grenfell's statement in paragraph 32 to the effect that prudential regulation only concerns matters relating to a company's abilities to meet its liabilities in full (i.e. its solvency) seems to be based on paragraph 39 of the defendant's Summary Grounds which states: *'Prudential regulation was governed by the provisions of Part II of the Insurance Companies Act 1982 and the Regulations made under that Act. Such regulation **PRIMARILY*** [my emphasis] *related to the supervision of the solvency of life insurance companies in the context of their ability to meet and continue to meet their liabilities to policyholders **and to fulfil the reasonable expectations of policyholders or potential policyholders under policies of insurance.**'* [my emphasis]

74. So Judge Grenfell is actually misrepresenting the Ombudsman's views. The Ombudsman said that prudential regulation is PRIMARILY concerned with solvency issues, Judge Grenfell distorts this to say that the Ombudsman said that prudential regulation is ONLY concerned with solvency issues.

75. You will of course appreciate that even if, in practice, the FSA were only concerned with solvency when they supervised the Scottish Widows demutualisation, they should (had a legal obligation to) have been concerned with PRE as well. Either way my complaint that the FSA did not properly supervise the Scottish Widows demutualisation still stands. It is a case that either they did something that they were required to do negligently (or dishonestly) or they didn't do that thing at all. It makes no difference.

76. Again. Did Judge Grenfell do this by accident? Is that likely? Is it possible? When the Ombudsman herself clearly states that prudential regulation is primarily concerned with solvency and that protection of PRE is one of the instances where a regulator might intervene in a transfer of long term business, what quirk, idiosyncrasy, peculiarity, foible, oddity or eccentricity in Judge Grenfell's brain makes him say that prudential regulation is only concerned with solvency or that the FAS were only concerned with solvency during the Scottish Widows demutualisation?

77. Why is this important? It is important because there is, as the Ombudsman herself clearly stated, a second arm to prudential regulation and that is the issue of protecting Policyholders' Reasonable Expectations (which is called PRE). It just so happens that not only did transfers of long term business (which is what the Scottish Widows demutualisation was) fall within the scope of this area of prudential regulation but that I specifically identified and explained this point in my original application. So Judge Grenfell has quite remarkably managed to completely overlook one of the two main areas of prudential regulation (a 50% error rate), which happens to be the one that is relevant to this case, and he did so in spite of the fact that I specifically drew his attention to the matter and it was acknowledged by the defendant. How did he manage to do that? By accident? I don't think so.

78. So, to clarify this matter, how did I explain the issue of PRE? I pointed out (page 00051 of the bundle, which is paragraph 53 of part 8 of my application form) not only that protection of PRE was a significant element of prudential regulation but that the Ombudsman herself, in her report on Equitable Life, had specifically identified ('Equitable Life: A decade of regulatory failure', part 2, page 93, para. 435), by reference to official documents, that one way in which a regulator could exercise its prudential functions in relation to protecting PRE was to intervene in a transfer of long term business being carried out under Part 2 of the Insurance Companies Act! Thus, not only did I identify protection of PRE for the benefit of Judge Grenfell but I provided him with an example, based on official documents, and quoted by the Ombudsman herself, which specifically proves that a transfer of long term business, and related activities (including the preparation of and sending out of a policyholder circular under Part 2) falls within the scope of the protection of PRE area of the regulator's prudential regulation functions. And yet Judge Grenfell entirely ignores even the existence of the protection of PRE and concludes that the sending out of a policyholder circular under s.49 relates conduct of business regulation because it is not a solvency issue. Well, even if he is right that the preparation and sending out of a circular in relation to a transfer of long term business is not a solvency issue (although, if you think about it, the terms of a transfer of long term business most definitely can have solvency implications – remember that I am a Chartered Accountant with over 30 years experience and that I have worked in the life insurance sector, whereas Judge Grenfell is an ordinary consumer in terms of his knowledge and experience), it is unquestionably a protection of PRE issue and, on this basis, clearly falls within the scope of the FSA's prudential regulation functions. So, the terms of a transfer of long term business, as laid down in a policyholder circular, are certainly a protection of PRE issue and can also be a solvency issue; both of which matters fall within the prudential regulation functions of the FSA.

79. So while a transfer of long term business unarguably falls within the scope of the prudential regulation functions of the FSA, Judge Grenfell concludes that the single most important aspect of such a transfer (the terms of the transfer), as explained in a policyholder circular sent to those who have to approve it, does not fall within the scope of the prudential regulation functions of

the FSA. This is a conclusion that is so patently nonsensical that it can only be described as barmy. One can only conclude that Judge Grenfell is determined to fly in the face of the facts, simple and obvious though they are. Why is this? I am clear that it has a lot to do with refusing to expose a fellow judge (Judge Kaye) and the fact that I am a litigant in person. Judge Grenfell thinks that justice for me does not matter and that he can get away with it. He is wrong on both counts.

80. Judge Grenfell seems to be under the impression that saying that something is 'entirely logical' three times in the space of one short paragraph (his paragraph 32) makes it so. This is not correct.

81. It is therefore a further ground of appeal that Judge Grenfell misdirected himself by completely ignoring the existence of protection of PRE as one of the two main areas of prudential regulation (in spite of the fact that this was made clear by both myself and the defendant, as referenced above) and that protection of PRE demonstrably (on the basis of the Ombudsman's own report in to the Equitable Life crisis) covered transfers of long term business under Part 2 of the Life Insurance Companies Act 1982 and related activities, including the preparation and sending out of a policyholder circular under s.49 of that Act (which is in Part 2), the terms explained in such a document being the single most important element of such a transfer.

82. It is important to note that both of the arguments put forward by the Ombudsman to support her assertion that the preparation and sending out of the policyholder circular fell within the FSA's conduct of business regulation functions as opposed to its prudential regulation functions are, and have been proved to be, arrant nonsense.

83. The first argument (para. 105 of the Summary Grounds, being bundle p. 00115) referred to the FSA Handbook, but it was clear that the Ombudsman was quoting from the current FSA Handbook and had not checked whether that handbook actually applied back in 1999/2000. A slight oversight. The handbook also specifically states that *'This sourcebook applies to a firm with respect to the following activities carried on in relation to a* ***non-investment insurance contract*** [my emphasis] *from an establishment maintained by it, or its appointed representative, in the United Kingdom.'* The entire sourcebook had NOTHING to do with transfers of long term business and specifically relates to non-investment insurance contracts to the exclusion of anything else. The Ombudsman could not have been wider of the mark – but it proves how bereft of arguments she was that she should find it necessary to use this argument as her first and main argument on this point.

84. The second argument referred to s.47 Financial Services Act 1986, but the words of the Act quoted refer to a *'market in or the price or value of any investments'* and of *'inducing another person to acquire, dispose of, subscribe for or underwrite those investments.'* But in the case of the Scottish Widows demutualisation, the policyholders were not acquiring any investments (they were already policyholders), they were not disposing of any investments (they held onto their policies) and they were not subscribing to or underwriting any investments. Thus, s.47 is also COMPLETELY IRRELEVANT.

85. Even if it could be argued that the demutualisation involved policyholders disposing of rights under long term insurance contracts, as defined in Financial Services Act 1986, Sch. I, Part I, Clause 10, under sub-clause (a) of clause 10 that clause does not apply to rights under a contract if *'the benefits under the contract are payable only on death or in respect of incapacity due to injury,*

sickness or infirmity'. This means that if Scottish Widows had ANY such policies at the time of the demutualisation (as of course they did), those policies were not **investments** as defined in Sch I, Part I*, which means that s.47, which relates only to 'investments' as defined in the Act, did not apply to them. Thus, there were demonstrably Scottish Widows policies in existence at the time of the demutualisation which were outside the scope of s.47 in any circumstances.

*s.1(1) Financial Services Act 1986 states that *'In this Act, unless the context otherwise requires, "investment" means any asset, right or interest falling within any paragraphs in Part I of Schedule I to this Act.'*

86. Thus, BOTH of the arguments put forward by the Ombudsman on this point were, as stated, arrant nonsense. The words of s.49 are so clear that the Ombudsman was forced to dig up ANYTHING that stood a remote chance of being capable of being used to argue the other way, even if such arguments could not survive the most cursory scrutiny.

Paragraph 33 of the judgement (solvency of Scottish Widows – actual and perceived)

87. In paragraph 33 of the judgement Judge Grenfell says: *'In my judgment, the Parliamentary Ombudsman was entitled to take the view that she had no jurisdiction to investigate the sending out of the Circular and any misleading effect it may have had on policy holders. The Parliamentary Ombudsman's stance in respect of the Equitable Life investigation is logically distinguished by her on the simple basis that Equitable Life could not meet its GAR liabilities, which was plainly a matter of prudential regulation, unlike Scottish Widows which could meet its GAR liabilities.'*

88. In the first place it is not the sending out of the circular that matters so much as the manner in which it sets out the terms of the proposed transfer. Judge Grenfell is looking at the form rather than the substance of the matter. Perhaps it is Judge Grenfell's concentration on form rather than substance that accounts for his misguided conclusions.

89. It is therefore a further ground of appeal that Judge Grenfell failed to identify that my complaint concerned the contents of the circular (the terms of the proposed transfer), its substance, rather than the mere 'sending out' of that circular, its form.

90. In the second place Judge Grenfell's reference to Scottish Widows being able to meet its GAR liabilities is misguided. It was absolutely irrelevant to my complaint whether Scottish Widows could or could not actually meet its liabilities, what mattered was a **perception** on the part of the public that it could not meet its liabilities that would have arisen had the existence of the £1.5 billion GAR liability become publicly known. It is of course my view that it was a fear of this happening that drove the whole demutualisation process - and the 'Additional Account' scam that formed the key part of that process; in other words that the whole process was designed to get the policyholders to pay for the £1.5 billion GAR liability without realising it existed (until after the event when it was a *fait accompli*). Judge Grenfell ought to know (it is a matter of common knowledge) that what causes a run on a bank or any other financial institution is not its actual solvency but its perceived solvency. Is Judge Grenfell so naïve in financial matters that he is not aware of this?

91. The similarity between the Equitable Life crisis and the Scottish Widows demutualisation is that

they were both situations in which the FSA failed to properly supervise the GAR liabilities of life insurance companies, and part of their failure to supervise included, in both cases, deliberately misleading (i.e. lying to) the policyholders about the existence and extent of those GAR liabilities (this was a specific finding of the Ombudsman in her report on Equitable Life). This is sufficient and the question of actual solvency is completely irrelevant. As Judge Grenfell ought to know, the main statutory objective of the FSA is to maintain market stability, that market stability depends upon people's perception of a state of affairs. This means that managing market stability means managing people's perceptions. It has been **proved** (in the Ombudsman's report) that in the case of Equitable Life the FSA tried to manage people's perceptions by lying to them; all I am pointing out is that they did exactly the same thing in the case of Scottish Widows. This should come as no surprise in an organisation which has been proved by the Ombudsman herself to be 'not fit for purpose'; indeed, such conduct is par for the course.

92. A final point. Judge Grenfell maintains that Scottish Widows had enough money to meet its GAR liability. One question. If that was the case then why did they need to use the money in the 'Additional Account'? It was not Scottish Widows' money that was used to meet the GAR liability, it was the policyholders' money – and that is the whole point. Scottish Widows did **not** have enough money itself to meet the GAR liability, which is why it had to dream up the 'Additional Account' scam in the first place; it had to get one group of policyholders (the ordinary policyholders) to pay another group of policyholders (the GAR policyholders). You see, Judge Grenfell, it all makes sense when you think about it. Judge Grenfell seems to be implying that Scottish Widows used the ordinary policyholders' money to pay the GAR policyholders when they didn't need to do so. An interesting idea.

93. It is therefore a further ground of appeal that Judge Grenfell failed to identify that the comparison between Equitable Life and Scottish Widows related to a failure on the part of the FSA to properly supervise the GAR liabilities of both companies, that they deliberately misled policyholders in both cases and that in both cases the policyholders suffered loss as a result; in the case of Equitable Life by losses relating to their policy values and in the case of Scottish Widows by the 'loss' (read 'theft') of the balance on the Additional Account, which they had been led to believe would be paid to them over time as terminal bonus (and which, to that extent, was also a loss in policy values).

Paragraphs 34 and 35 of the judgement (Judge Grenfell's conclusion on jurisdiction)

94. It is therefore evident that Judge Grenfell's conclusion in paragraphs 34 and 35 to the effect that *'the Parliamentary Ombudsman's decision not to accept jurisdiction cannot successfully be challenged on judicial review'* is arrant nonsense. Judge Grenfell is so wildly wrong on so many counts and with respect to matters that are so patently clear and simple, as described above, that I can only attribute his conclusion to judicial bias. Indeed, it can only be judicial bias because we have established beyond doubt that Judge Grenfell has lied in several significant respects.

Paragraphs 36 to 45 of the judgement (time limits)

95. In paragraphs 36 to 45 Judge Grenfell deals with the issue of time limits; that is, whether I submitted my application within the 3 month time limit and, if not, whether there are grounds for disapplying the 3 month time limit.

Paragraph 38 of the judgement (continuing breach)

96. In paragraph 38 Judge Grenfell states that *'Mr Senior-Milne's reasoning and explanation are first of all that there was some kind of continuing "breach": the Parliamentary Ombudsman was "continuing not to do something", that is accept jurisdiction, "until she does that thing." There is, however, no basis for this argument.'*

97. But this is not true. The doctrine of continuing breach is well established and well known. Judge Grenfell could conclude that the doctrine does not apply in this case (and then give his reasons for reaching such a conclusion) but he cannot say that there is no BASIS for argument. There is a BASIS and that basis is the doctrine of continuing breach.

98. My argument is to the effect that the Ombudsman's failure to assess whether to carry out an investigation into my complaint constitutes a continuing breach because she is under a legal obligation to assess all complaints validly made to her and that she had not assessed my complaint on the spurious basis that it is not within her jurisdiction. The failure to do something that she is legally obliged to do continues until she does that thing, so the breach continues until she assesses my complaint.

99. At the renewal hearing I illustrated the applicability of the doctrine of continuing breach to the present case by reference to a House of Lords case Re McKerr (Northern Ireland) [2004] UKHL 12, which deals with an application for judicial review arising from a continuing breach which consisted of a failure to carry out an investigation, so the circumstances are directly comparable to the present case. It is important to note that the application for judicial review was made some 21 years after the decision not to carry out an investigation and was upheld by both the High Court and the Court of Appeal (although this centres round Article 2 ECHR). I submitted to Judge Grenfell that this case showed that there could be such a thing as a continuing breach in circumstances where a public official or body failed to carry out an investigation on spurious grounds. Although I clearly invited Judge Grenfell to consider this matter and put my arguments in relation to it, Judge Grenfell has refused to deal with my arguments at all, ignoring them completely and simply asserting that 'there is no basis for this argument'.

100. It is therefore a ground of appeal that Judge Grenfell misdirected himself when he said there is no basis for arguing that there is a continuing breach and that while he could have concluded that there was no continuing breach in this case, he would have had to give his reasons for coming to such a conclusion, taking into account my arguments on that issue. He did not do this.

Paragraph 42 of the judgement (consequences of concealment)

101. In paragraph 42 Judge Grenfell acknowledges that *'Where a potential defendant conceals material facts and that concealment results in a claimant failing to meet a time limit for bringing a claim for judicial review, then that would be a powerful factor for the exercise of discretion in favour of such a claimant.'*

102. I submit that this is wrong. Where a defendant conceals a material fact and this results in a claimant failing to meet a deadline for making an application for judicial review, then I would say that this is not just a 'powerful factor' but is sufficient reason on its own. It must be so because

otherwise a defendant might benefit from their own misdemeanour (the deliberate concealment). There can be no circumstances in which this should be allowed to happen.

103. It is a further ground for appeal that Judge Grenfell misdirected himself in this matter.

Paragraph 44 of the judgement (was there concealment?)

104. In paragraph 44 Judge Grenfell states that *'At the time of the complaint to the Parliamentary Ombudsman the complaint either was or was not within her jurisdiction. Her view that it was not was made clear as early as October 2006. To suggest that her staff deliberately sought to conceal the opposite is entirely without foundation. Mr Senior-Milne was entitled to express his disagreement, but according to him it was always a matter of argument based on clearly established facts. No facts, on his case, have been concealed from him. This allegation does not advance his argument in support of his application for judicial review.'*

105. Judge Grenfell states that it was the Ombudsman's view that my complaint was outside her jurisdiction but the whole basis of my argument was that this was not the Ombudsman's view. She said it was her view (but see paragraph 59) but she misrepresented to me what her view was because she knew very well that transfers of long term business fell within the scope of the prudential regulation functions of the FSA and that my complaint was therefore clearly within her jurisdiction. I proved this from documents prepared by the Ombudsman herself; her report on the Equitable Life crisis, as explained on page 00052 of the bundle.

106. The Ombudsman's report on the Equitable Life crisis proves that she knew that transfers of long term business (and hence the Scottish Widows demutualisation – and remember, my complaint was about the FSA's supervision of the demutualisation, which included the policyholder circular; it was not solely about the policyholder circular) were within the scope of the FSA's prudential regulation functions. It is therefore a denial of the plain facts, as proved by the Ombudsman's own words in her own report, for Judge Grenfell to say that my argument on this point is 'entirely without foundation'. 'Entirely without foundation'? But the Ombudsman has been proved to have lied by her own words in her own report.

107. It is therefore a further ground of appeal that Judge Grenfell misdirected himself when he stated that my allegation that the Ombudsman concealed the fact that she knew that my complaint was within her jurisdiction was 'entirely without foundation'. I put forward specific arguments on this point based on the Ombudsman's own report on the Equitable Life crisis. What better proof can you have than the Ombudsman's own written words in a public document? It is there in black and white.

Paragraphs 46 to 51 of the judgement (which concern the second ground of my application for a judicial review)

108. The second ground on which I sought a judicial review related to the Ombudsman's refusal to respond in any substantive way, other than by acknowledgement slips, to my complaint of 16/2/2009 (reminders of 15/3/2009 and 13/4/2009, Letter Before Claim of 1/5/1009) that 4 separate members of staff in the Ombudsman's office, including a director, had lied to the appellant in claiming that his complaint of 21/10/2006 was outside her jurisdiction, which fact the

appellant discovered in January 2009 by reading the Ombudsman's report of July 2008 on the Equitable Life crisis.

109. In paragraph 49 of his judgement, Judge Grenfell states *'Mr Senior-Milne… did not bring this complaint through a member of parliament. This is a complete answer to his application for judicial review.'* In making this statement Judge Grenfell completely misunderstands the nature of the second ground on which I applied and of the application of s.5 Parliamentary Commissioner Act 1967. The complaints which need to be referred by an MP under s. 5 are only those made against the bodies specified in Schedule 2 of the Act, as Judge Grenfell himself states in paragraph 8 of his judgement. Complaints to the Ombudsman against her own staff clearly do not fall within the scope of s.5 and so do not need to be referred by an MP. In addition, the existence of s.5 does not preclude people from making complaints to the Ombudsman against her own staff, which is effectively what Judge Grenfell is saying. His assertion is nonsense.

110. Having said that my 'failure' to have my second complaint referred by an MP is a complete answer to my application for judicial review, Judge Grenfell then proceeds in paragraph 50 on the assumption that it is not a complete answer (he refers to 'some kind of exception'). He says that, in any event, my application has no reasonable prospect of success because the Ombudsman's staff had made it clear that she was not accepting that she had jurisdiction over my first complaint. But what if the reason given for not accepting jurisdiction was wrong and the Ombudsman's staff knew it was wrong (i.e. they lied)? Judge Grenfell is effectively saying that a reason is sufficient even where the reason is wrong and the person giving that reason knows it to be wrong. So, to summarise:

a. I complain that the Ombudsman's staff gave a wrong reason and that they knew it was wrong;

b. Judge Grenfell responds *'But they did give **a** reason, and regardless of whether that reason was wrong and they knew it to be wrong, I regard that as sufficient.'*

This is Alice in Wonderland logic, unworthy of a court of law. It makes a mockery of the law. It is the argument of a man who holds justice (or at least justice for me) in complete contempt.

111. It is therefore a further ground of appeal that Judge Grenfell has misdirected himself in this matter.

Paragraphs 52 and 53 of the judgement (costs)

112. The defendant's Summary Grounds, paragraph 116 (bundle page 00119) state that the grounds on which the Ombudsman seeks recovery of costs is that my application was 'misconceived and wholly without merit'. The court has not ruled that my application was 'misconceived and wholly without merit', so the application for costs should be dismissed. The basis on which the defendant sought to rely has not been confirmed by the court. If a party applies to the court on certain grounds and those grounds are not upheld by the court then the application must fail. The court may perhaps amend the grounds if it sees fit but it cannot grant the original application if it has not upheld the grounds on which that application was made in the first place.

113. I have already lodged a separate appeal against the costs order made by Judge Kaye. I wish

this appeal to stand and to be joined with that appeal.

Statement of truth

I believe that the statements I have made in this document are true.

Graham Senior-Milne